United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7161

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Defendants-Appellants Ford Motor Company and Ford Marketing Corporation (collectively "Ford") submit this brief in reply to FLM's brief as appellee ("FLM's brief").

FLM's brief is singularly non-responsive. It fails to come to grips with the dispositive authorities set forth in Ford's principal brief as appellant which mandate reversal of the District Court's finding of price discrimination in violation of the Robinson-Patman Act.

I.

Price Discrimination

1.

FLM's entire discussion of the critical issue on this appeal —whether Ford discriminated in price between dealers

when all were accorded identical price treatment—is wide of the mark. Aside from its own *ipse dixit* (*e.g.*, FLM's brief, p. 9), FLM cites no authority even remotely supporting the unsound proposition that a lower price functionally available to all purchasers is a price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act. Indeed, FLM's brief is written as if all of the controlling cases cited at pages 20-22 of Ford's principal brief as appellant had never been decided; for FLM does not mention a single one of them.* The plain, undisputed and indisputable fact is that Ford treated all its purchasers alike. Each dealer received the incentive allowance on resales to independent repair shops and did not receive it on other sales, including those to FLM. Hence there was no favored dealer, and no price discrimination.

2.

In apparent recognition that Ford's position is otherwise unassailable, FLM resorts to rhetoric. Without a semblance of analysis, FLM repeatedly makes the sweeping assertion that all purchasers of similar commodities must be charged the same price unless the difference is cost justified. (FLM's brief, pp. 9, 11, 13, 17) This is nothing less than declaring by fiat that dual pricing is outlawed by the Robinson-Patman Act. Under FLM's unprecedented view of Section 2(a), Ford would be required to charge its dealers the same price if they resold parts to a vehicle owner, to a retailer, to another dealer or to anyone else. Even the District Court did

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* *E.g.*, *FTC* v. *Borden Co.*, 383 U.S. 637 (1966); *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969). *Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F.2d 768 (8th Cir.), *cert. denied*, 293 U.S. 590 (1934); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 389 F. Supp. 1334 (N.D. Calif. 1975).

not intend by its ruling to abolish all functional discounts (Slip Opinion, 1623a); yet as FLM has been forced to concede (FLM's brief, p. 17), this is precisely the result which follows from its argument. Such a drastic departure from the realities of the marketplace—a departure which could well ring the death knell for wholesalers—finds absolutely no support in the Robinson-Patman Act and should be categorically rejected.

3.

The few cases which FLM cites lend no support to its untenable position. *Mueller Co.* v. *FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), the case FLM principally relies upon (FLM's brief, pp. 10, 13, 14), held merely that a discount granted to certain purchasers and not others was discriminatory when it was *not* functionally available to the disfavored customer. The Seventh Circuit could not have been clearer:

> "Because we think the Commission's finding is based on substantial evidence, it follows that it was warranted in concluding that § 2(a) was violated by price discrimination in that the 'functional discount' was not available to all other jobbers or customers of petitioner . . . ." *Id.*, at 46.

Here, all dealers received equal treatment, the very antithesis of discrimination. In short, *Mueller* confirms the validity of Ford's incentive allowance.

Perkins v. *Standard Oil Co.*, 395 U.S. 642 (1969) (FLM's brief, p. 12), is likewise inapposite. Perkins, the plaintiff, was a disfavored direct purchaser who paid a higher price than Signal, the favored purchaser. The case has no bearing whatsoever here where no purchaser received disfavored treatment.

Nor does the FTC advisory opinion, 16 C.F.R. § 15.333 (1969), cited at p. 18 of FLM's brief, have any bearing on this case. All the Commission stated was that a discount "contingent upon the imposition of specified *restrictions* upon [the] customers" (emphasis added) could not be approved—in other words, that it would not give clearance to a discount *conditioned upon* a post-sale restriction. Here, of course, the District Court found that there was no such restriction. (Slip Opinion, 1634a-35a)

In sum, FLM's argument on the Section 2(a) issue boils down to rhetoric with no substance. The reasons for reversal set forth in Ford's principal brief as appellant remain unanswered.

II.

Standing

1.

FLM's argument on standing to sue is grounded on its claim that "FLM was the intended target" of the 1971 change in Ford's incentive allowance requirements. There are two infirmities in this assertion: First, a defendant's subjective intent is legally irrelevant to the standing issue; and second, as a matter of fact, Ford demonstrably had no such intent.

On three separate occasions this Court has held that plaintiffs who alleged only indirect and incidental injury had no standing to sue for damages under the antitrust laws *despite express allegations that the defendants specifically intended to harm them.* In *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389 (S.D.N.Y. 1939), this Court affirmed

dismissal of an action by a shareholder claiming "impairment of his stock" (30 F. Supp., at 391) despite the complaint's allegation that the alleged conspiracy against plaintiff's company was "calculated and intended to, and actually did . . . destroy the value of the stock . . . for use by [plaintiff]." Complaint, ¶ XXXII, Record on Appeal, p. 49 *et seq.**

Likewise, in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969), this Court affirmed dismissal of RCA's counterclaim which alleged that SCM had "wilfully abused [its] dominant position to eliminate RCA's position in the market . . . ." Counterclaim ¶ 61, Appendix, p. 36a. Over Judge Timbers' dissent on this very point,** this Court assumed the counterclaim's allegations to be true and affirmed dismissal for want of standing.

The implicit holdings of *Westmoreland* and *SCM* were made most explicit in *Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). There, the proposed amended complaint alleged that "it was the intent and purpose [of defendants] that plaintiff be removed as a competitor . . . ." (Record on Appeal, p. 73). In affirming summary judgment dismissing plaintiff's claim, Judge Anderson held:

> "Summary judgment was an appropriate remedy in this case, because the factual questions of motive

* Plaintiff's brief on appeal in *Westmoreland* stressed that "this intention to eliminate [plaintiff] and his corporations from competition in the industries sought to be monopolized is repeatedly alleged." Appellant's Reply Brief, p. 2.

** Judge Timbers distinguished the earlier standing cases because "in not one of these cases was it alleged that the anti-competitive action was taken with the specific aim of harming the plaintiffs." 407 F.2d, at 172.

and intent were not material to the appellant's standing." *Id.*, at 189, citing *SCM*.

These cases render completely immaterial FLM's claims that Ford intended to injure it; even if that were so, FLM —whose claimed injury is indirect, incidental and derivative —has no standing to sue as a matter of law. What is more, FLM's claim is patently faulty as a matter of fact.

All the District Court "found" was that Ford, when it changed its incentive policy in 1971, must have had FLM in mind "as a shining example of the type of successful middleman Ford was attempting to discourage." (Slip Opinion, 1603a) To the extent that this statement may be read as a finding that Ford intended to injure FLM—and we do not think that this is a fair reading—it has no support in the record. For it is undisputed that dealers who resold crash parts to FLM continued to receive the allowance for some 16 months after the change became effective —a fact FLM studiously avoids mentioning. (Stip. 24-25) Such a delay is fundamentally inconsistent with the notion that Ford changed its policy for the purpose of injuring FLM. *See* discussion at pp. 6-9 of Ford's answering brief on FLM's cross-appeal.

2.

The cases FLM cites in support of its standing argument take it nowhere. *Hanover Shoe, Inc.* v. *United Shoe Machinery Co.*, 395 U.S. 481 (1968), involved a price-fixing suit by an overcharged lessee who dealt directly with the plaintiff; it has no bearing in a price discrimination case, much less an action by a person indirectly injured.*

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* FLM's reference (FLM's brief, p. 23) to *Hanover Shoe's* exception for preexisting cost-plus contracts is inapposite since

(footnote continued on following page)

FTC v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), which was a suit by the Federal Trade Commission (not by a private party as FLM suggests) against a buyer for inducing illegal discriminatory promotional payments, has nothing whatever to do with the standing of a private non-purchaser to sue a seller for alleged price discrimination.* *Perkins* v. *Standard Oil Co., supra*, is also distinguishable since the plaintiff was a direct purchaser from the defendant—precisely what FLM was not. (*See* Ford's principal brief as appellant, pp. 36-37)

Littlejohn v. *Shell Oil Co.*, 483 F.2d 1140, 1143 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973), and *Southern Concrete Co.* v. *United States Steel Corp.*, 394 F. Supp. 362, 377 (N.D. Ga. 1975), are likewise of no avail to FLM. Neither case involved a suit under Section 2(a) by a repurchaser from a seller's customer. Rather, they concerned suits by totally non-related competitors who were permitted to sue based on a theory akin to that applicable in primary-line cases.**

3.

FLM attempts to distinguish the controlling standing authorities by maintaining that no one but FLM could

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(footnote continued from preceding page)

there was no showing here of any such contract between FLM and a dealer. To the contrary, the "mark-up" by dealers on resales of crash parts to FLM varied from 2% to 5%. (442a-44a) It has been squarely held that "this variable fixed margin arrangement is not encompassed in the preexisting cost-plus exception of *Hanover Shoe.*" *Albertson's Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43, 51 (D. Utah 1973), *mod. on other grounds*, 503 F.2d 459 (10th Cir. 1974).

* For a detailed discussion of the inapplicability of *Fred Meyer* to a price discrimination claim under Section 2(a) see Ford's answering brief as cross-appellee, pp. 31-36.

** In any event, those decisions in the Fifth Circuit are not controlling here in light of this Court's clear and long-settled rules on standing to sue under the antitrust laws.

possibly be injured here. (FLM's brief, pp. 22-23) Assuming *arguendo* a violation of the Robinson-Patman Act (contrary to Ford's basic legal argument that there was no discrimination), it is FLM's dealer-supplier who was directly and immediately injured. Even if that dealer passed on its entire higher costs to FLM, it still lost profits to the extent that it could be shown that FLM lost sales and accordingly purchased fewer parts from that dealer; and under *Enterprise Indus., Inc.* v. *Texas Co.,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957), such lost profits would properly be recoverable in a suit by the dealer.

III.

Damages

1.

FLM's argument on the damages issue completely fails to cope with this Court's controlling decision in *Enterprise Indus., Inc.* v. *Texas Co., supra.* That case holds that an allegedly disfavored purchaser suing under the Robinson-Patman Act is not entitled to recover automatically the amount of the alleged discrimination. Instead, he must show that "favored" customers paid less and reflected this fact by lowering their prices which caused the plaintiff to lose profits or customers. FLM's discussion of the doctrine (FLM's brief, pp. 35-36) wholly disregards this critical point.

2.

FLM asserts (FLM's brief, p. 37) that Ford "stipulated" in the District Court that the withheld allowances were a proper measure of damages. Ford made no such stipulation. The passage quoted by FLM and referred to by the District Court (Supp. Opinion, 2024a) appeared in Ford's post-

trial brief. (1545a) At the hearing on damages held in February 1976, when the District Court sought to characterize this passage as a "concession," Ford promptly and vigorously objected to any such characterization (1877a-78a) and made it clear that Ford considered the amount of the alleged discrimination to be the *most* that FLM could recover. (*Id.*)

Equally erroneous is FLM's assertion (FLM's brief, p. 39) that Ford did not challenge at trial FLM's attempt to recover for "lost sales." The evidence reviewed at pp. 45-48 of Ford's principal brief as appellant was adduced by Ford both at the 1974 trial on liability and the 1976 hearing on damages. Moreover, this evidence was again brought to the District Court's attention at the close of the hearing on damages. (1999a-2001a)

CONCLUSION

The decision of the District Court finding liability under the Robinson-Patman Act should be reversed and the complaint dismissed.

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Respectfully submitted,

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